2-17-1976

Don Tate v. Commonwealth of Kentucky

Appellee's Brief 1975-SC-1009

APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

FILE NO. 75-1009

DON TATE — APPELLANT

V.

APPEAL FROM THE JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH, FIRST DIVISION
S. RUSH NICHOLSON, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLEE

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This is to certify that a copy of the foregoing Brief for Appellee has been mailed, first class postage prepaid, to the Honorable S. Rush Nicholson, Judge, Jefferson Circuit Court, 104 Courthouse Annex, Louisville, Kentucky 40202; Honorable David L. Armstrong, Commonwealth's Attorney, 401 Kentucky Home Life Building, Louisville, Kentucky 40202; and Honorable Daniel T. Goyette, Assistant District Defender, 1000 Republic Building, Louisville, Kentucky 40202, Counsel for Appellant, on this the 4th day of February, 1976.

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STATEMENT OF THE QUESTIONS PRESENTED

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VII. WHETHER THE TRIAL COURT PROPERLY OVERRULED APPELLANT'S OBJECTION TO THE CLOSING ARGUMENT OF THE COMMONWEALTH'S ATTORNEY.

COUNTERSTATEMENT OF THE CASE

A. STATEMENT OF THE NATURE OF THE PROCEEDINGS:

Appellee accepts as substantially correct appellant's statement of the nature of the proceedings. Additional facts shall be referred to hereinbelow as necessary.

B. STATEMENT OF THE RELEVANT FACTS:

On Saturday, June 27, 1974, at approximately 11:00 A.M., the Toy Tiger Lounge on Bardstown Road in Jefferson County, Kentucky was robbed (Transcript of Evidence, p 287, hereinafter referred to as TE). Jo Ann Speidel, the secretary-bookkeeper of the Toy Tiger Lounge, testified that as she counted the receipts from the previous night she heard a knock at the rear door (TE 289-290). She stated that she opened the door approximately four to five inches and saw appellant who stated that he was looking for Freddie. He forced the door open and entered the office (TE 289).

Appellant had a raincoat draped over his right arm (TE 291). According to Speidel, appellant acted in such a way as to convince her that he had a gun in his right hand under the coat (TE 291).

Appellant grabbed the money, over $1,000, with his left hand and started to leave (TE 292). At this point Mrs. Speidel stated that she began to holler for help. After which she was struck in the back of the head and knocked to the floor, causing her glasses to be knocked off (TE 294). As appellant and his accomplices left, Maurice Bogel (hereinafter referred to

as "Bogel"), a cook at the Toy Tiger Lounge, came to Speidel's assistance (TE 295). Because her glasses had been knocked off, Speidel instructed Bogel to call out the numbers of the license plate of appellant's automobile and she would write them down (TE 296).

Speidel was however able to describe appellant's getaway car as a Ford with brownish-blackish vinyl top over a lighter brown body (TE 12). Speidel then notified the police department of the robbery and furnished them with a description of the appellant and automobile in which he escaped (TE 298-299).

Detective Ron Howard of the Jefferson County Police Department stated that he observed the automobile described by Mrs. Speidel pull into the parking lot of the Lynnview Shopping Center, Jefferson County, Kentucky driven by a person who fit the description of Speidel as the man who robbed her (TE 48).

Howard stated that he ran a license plate check on the automobile driven by appellant which revealed that the automobile had been stolen (TE 45). Appellant was arrested in the vicinity of the Lynnview Shopping Center when he was attempting to get into a taxi cab (TE 46). And after having been advised of his constitutional rights, appellant confessed to the robbery of the Toy Tiger Lounge to several police officers (TE 49-51).

ARGUMENT

I

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE FOUND IN AUTOMOBILE AND ITEMS DISPOSED OF BY APPELLANT.

Appellant first complains that the trial court committed prejudicial error by permitting the introduction into evidence of surgical gloves and sunglasses, found in the truck of the automobile which appellant drove, and the introduction into evidence of a wine bottle and handcuffs which appellant deposited in a trash container at the Lynnview Shopping Center, Jefferson County, Kentucky. By the introduction of these articles into evidence appellant argues that the trial court permitted appellant to be convicted on the basis of inflammatory, collateral, and immaterial evidence. We disagree.

It should be noted that appellant sought to exculpate himself from the commission of the crime charged by eliciting testimony from the investigating officers that none of his fingerprints were found in the automobile nor on the wine bottle and handcuffs.

The testimony of Officer Howard revealed that appellant drive the automobile in question into the Lynnview Shopping Center parking lot (TE 48), and deposited the handcuffs and wine bottle in a trash can (TE 42). Clearly, evidence of the presence of surgical gloves, found in the trunk, is relevant to explain the absence of appellant's fingerprints in the automobile and on the bottle and handcuffs.

In the instant case the evidence of appellant's guilt of the crime charged was overwhelming. Rule 9.24 of the Kentucky Rules of Criminal Procedure provides that . . . "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The introduction into evidence of the contents of a brown paper bag which appellant deposited in a trash container at the Lynnview Shopping Center, handcuffs and an empty wine bottle, which appellant now claims constituted prejudicial error, shrinks into insignificance in the face of the evidence pointing to appellant's guilt of the offense charged. The introduction into evidence of the wine bottle and handcuffs, if error at all, is harmless error (RCr 9.24).

II

APPELLANT FAILED TO PRESERVE FOR APPELLATE REVIEW THE QUESTION AS TO WHETHER OR NOT THE TRIAL COURT PROPERLY PERMITTED THE INTRODUCTION OF HEARSAY EVIDENCE.

Appellant candidly admits that he failed to object to the admission of the testimony which he now argues constituted prejudicial error, requiring reversal. We would hasten to note that this Court has consistently held that it would not review an assignment of error which has not been preserved for review by objection. Hobbs v. Commonwealth, Ky., 481 S.W.2d 81 (1972); Tucker v. Commonwealth, Ky., 510 S.W.2d 21 (1974).

III

THE TRIAL COURT PROPERLY REFUSED TO ADMIT INTO EVIDENCE RESPONSES OF THE COMMONWEALTH CONTAINED IN ITS BILL OF PARTICULARS.

Appellant next argues that the trial court improperly refused to permit him to introduce the responses contained in a Bill of Particulars and was thereby somehow deprived of his right to confront the witnesses against him. As a result he claims he was denied a fair trial. We disagree.

Appellant alleges that the answers given in the Bill of Particulars constitute "prior inconsistent statements by the Commonwealth" and should have been permitted to be introduced into evidence to impeach or discredit the testimony of several police officers.

It should first be noted that the answers contained in the Bill of Particulars were not made by the police officers whom appellant sought to impeach. Hence, they were not prior inconsistent statements by the witnesses and were therefore not competent for the information intended by appellant. As such Jett v. Commonwealth, Ky., 436 S.W.2d 788 (1969) has no application to the case at the bar.

Secondly, appellant had the opportunity to cross-examine each of the witnesses against him and was not denied the opportunity to confront them as he now alleges.

Finally, the purpose of a Bill of Particulars as stated in James v. Commonwealth, Ky., 482 S.W.2d 92 (1972) is stated as follows:

> "The function of the bill of particulars in a criminal case is to provide information fairly necessary to enable the accused to understand and prepare his defense against the charges without prejudicial surprise upon trial. It is complementary to the shorter form of indictment."

Appellant made no motion for mistrial on the basis of surprise, instead sought to impeach the testimony of witnesses by answers in a Bill of Particulars which the witnesses did not make. Appellant's argument to the contrary is without merit.

IV

THE TRIAL COURT PROPERLY OVERRULED APPELLANT'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL ON THE CHARGE OF ARMED ROBBERY.

Appellant next challenges the sufficiency of evidence to support a conviction for armed robbery. In support of such an argument he contends that the trial court committed reversible error by refusing to direct a verdict of acquittal on the armed robbery charge. Again we must respectfully disagree.

Appellant admits that the use or display of a deadly weapon as required by KRS 433.140 may be established by evidence that the assailant used any object which was intended to convince the victim that it was a deadly weapon and which did so convince him. Styles v. Commonwealth, Ky., 507 S.W.2d 487 (1974); Terry v. Commonwealth, Ky., 471 S.W.2d 730 (1971); Travis v. Commonwealth, Ky., 457 S.W.2d 481 (1970); Merritt v. Commonwealth, Ky., 386 S.W.2d 727 (1965). In Travis, supra, the victim of an armed robbery had not seen a weapon but merely felt a point held at his back by his assailant. There this Court upheld the convic-

tion for armed robbery. Speidel, the victim in the instant case, testified that appellant's whole arm and hand was covered and that the appellant led her to believe that he had a gun in his right hand (TE 291). She further testified that appellant picked up the money off of her desk with his left hand (TE 291). In addition, she testified that after Bogel called the license number to her she warned her to get back that she might be shot (TE 298) and that the reason for such apprehension was that she in fact thought appellant had a gun when he came into the office (TE 298).

The evidence of record clearly established that Speidel was placed in a state of real apprehension that her assailant was in fact armed with a deadly weapon. Such being the state of the law in the evidence, the trial court properly overruled appellant's motion for a directed verdict of acquittal.

V

THE TRIAL COURT PROPERLY CONDUCTED APPELLANT'S TRIAL.

Appellant next presents the argument that the trial court "...prevented the appellant from effectively representing himself and presenting his own defense." Again we disagree.

It should be emphasized that the appellant demanded and did represent himself at trial, with the advice and counsel of Daniel T. Goyette, an Assistant Public Defender for the Jefferson District, Louisville, Kentucky.

Every litigant is entitled to an unbiased, patient, careful, and conscientious trial judge. See Flannery v. Common-

wealth, Ky., 443 S.W.2d 638 (1969) and Bradley v. Commonwealth, 218 Ky. 675, 291 S.W. 1047 (1927).

Additionally it is elementary that a trial judge is charged with the conduct of the trial within certain rules. Appellant was admittedly untrained in the law and as a result it is not difficult to expect that certain difficulties in the conduct of the trial would arise as a result of appellant's unfamiliarity with the rules of evidence.

It would not be unexpected therefore that the trial court would take a more active role in protecting the record. In the instant case the trial court did just that.

During an in-chambers hearing the trial court stated: "I want this man to have the fairest trial he could possibly have." (TE 31).

A careful examination of the record clearly reflects that the attitude indicated by the foregoing quotation was maintained throughout the trial, and the trial court sought to ensure the fairest possible trial for the appellant within the rules.

VI

THE TRIAL COURT PROPERLY REFUSED TO PERMIT APPELLANT TO TESTIFY DURING HIS CLOSING ARGUMENT.

Appellant next argues that the trial court committed reversible error when it prohibited appellant from asserting his innocence during his closing argument. In doing so, appellant contends that the trial court erroneously prevented appellant from advocating a permissible inference from the facts in evidence. We disagree.

Appellant chose not to testify in his own behalf, thereby not subjecting himself to cross-examination. However, during his closing argument he stated "I can't emphasize enough to you how important this is to me. I will tell you simply that I am innocent of this charge. I didn't do it." (TE 523) The Commonwealth objected to appellant's testifying, and the objection was sustained with the admonition by the trial court that "you cannot testify. You must stay with the evidence." (TE 523)

We cannot disagree with appellant's argument that a defendant has a constitutional right to represent himself and conduct his own defense. Wake v. Barker, Ky., 514 S.W.2d 692 (1974). Nor can we disagree with appellant when he states that an accused who elects to represent himself is generally held to the same standard of conduct as a practicing attorney. And we must also agree that the law in Kentucky with reference to argument provides that one:

> ". . . is entitled to draw reasonable inferences from the evidence, to make reasonable comment upon the evidence and to make a reasonable argument in response to matters brought up by the defendant . . . ." See Hunt v. Commonwealth, Ky., 466 S.W.2d 957 (1971); Peace v. Commonwealth, Ky., 489 S.W.2d 519 (1973); Richards v. Commonwealth, Ky., 517 S.W.2d 237 (1975).

In the instant case the foregoing declaration of innocence by appellant clearly makes no reference to the evidence of record. It appears that he seeks to have the best of all possible worlds, that is to represent himself and testify without being under oath and without having to subject himself to cross-examination. Appellant's declaration of innocence

made during his closing argument is not based in the evidence but is clearly an act to testify without being under oath and subject to cross-examination and the trial court properly refused to permit such a tactic.

VII

THE TRIAL COURT PROPERLY OVERRULED APPELLANT'S OBJECTION TO THE CLOSING ARGUMENT OF THE COMMONWEALTH'S ATTORNEY.

Finally, appellant argues that the trial court committed reversible error by overruling his objection to the closing argument of the Commonwealth's Attorney. As a basis for such an argument appellant claims that the Commonwealth's Attorney, throughout his closing argument, engaged in improper and inflammatory comment. Again we disagree.

First, appellant states that the Commonwealth's Attorney was guilty of a flagrant comment upon appellant's failure to testify. That portion of the argument of the Commonwealth's Attorney to which appellant objects is as follows:

> "The Commonwealth is in a position where we can't hardly win. Mr. Tate's got the best of both worlds. I can't cross-examine him. I can only try to handle him. He has the Public Defender's Office sitting with him. He has good legal advice, and defends himself in a very competent manner, and I'm sure wants your sympathy and your understanding." TE p. 525.

The foregoing comments are clearly based in the evidence and such comments are not objectionable. See Richards, supra.

Next, appellant objects to the Commonwealth's Attorney referring to him as a professional. It should be noted that no objection was made at the time and as such appellant has not preserved the matter which he now alleges as error for appellate review. See Taylor v. Commonwealth, Ky., 432 S.W.2d 805 (1968); Jackson v. Commonwealth, Ky., 450 S.W.2d 244 (1970). However, we would be remiss in not referring to appellant's previous felony convictions of second degree burglary in the State of Utah and bank robbery in Colorado and further asserting that the appellant's status as a criminal was clearly based in the evidence and the comments by the Commonwealth's Attorney were proper. See Hunt, supra.

An examination of the evidence of record and the language used by the Commonwealth's Attorney during his closing argument reveals nothing more than fair and reasonable comment based upon the evidence, and such being the state of the law in the evidence the trial court properly overruled appellant's objection to the argument of the Commonwealth's Attorney. No error occurred.

CONCLUSION

For the foregoing reasona appellee submits that the judgment of the Jefferson Circuit Court should be affirmed.

Respectfully submitted,

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